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Human Rights From Manitoba

*A Newsletter Of Human Rights
Developments In Manitoba*

Volume 1, Number 12, Winter, 2001

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Kathy Mallett (left) and Sherri Walsh (right) are jointly awarded the first *Manitoba Human Rights Commitment Award* at the CLEA Human Rights Day Conference held in Winnipeg on December 8, 2000 see PAGE 2 for details

Human Rights From Manitoba is a publication of *The Manitoba Human Rights Commission*. Acting Editor: Tom Pieczonka. Our sincere thanks to Translation Services (Department of Culture, Heritage and Tourism) for its excellent service. Write us at: 7th Floor 175 Hargrave Street Wpg MB R3C 3R8. In Winnipeg, phone 945-3007, toll free 1-888-884-8681. In Northern Manitoba, 627-8270 (The Pas), toll free: 1-800-676-7084. For Western Manitoba, 726-6261 (Brandon), toll free: 1-800-201-2551. Our website: www.gov.mb.ca/hrc. Want to be on our mailing list? Please call today!



2000

Human Rights Commitment Awards



Sherri Walsh is presented the Commitment Award by Minister of Justice Gord Mackintosh



Kathy Mallet is presented the Commitment Award by Minister of Justice Gord Mackintosh



Minister of Justice Gord Mackintosh addresses the crowd.

The Community Legal Education Association's annual conference to commemorate International Human Rights Day was held at The Union Center on December 8th, 2000. The theme of the conference, which drew over 100 registrants was: "On The Edge: Advancing Human Rights through the Justice System". Workshop topics featured presentations and discussions of emerging human rights issues in the 21st Century. Topics included the impact of new privacy and freedom of information laws, recent Supreme Court of Canada decisions that affect obligations of employers and service providers to reasonably accommodate those with special needs, Youth Rights, and Balancing Victims Rights and the Rights of the Accused.

The Nellie McLung Theatre Group performed a number of thought-provoking vignettes that illustrated how human rights issues pervade many areas of our everyday lives. The keynote speaker was Mr. Alwyn Child, of the Office of the Federal Privacy Commissioner. In keeping with the theme of emerging issues, he discussed the impact of the new federal privacy legislation. The Honourable Gord Mackintosh, Minister of Justice and Attorney General of Manitoba presented the first Manitoba Human Rights Commitment Award to Kathy Mallet and Sherri Walsh. The winners of this important new award, which replaces the Manitoba Human Rights Commission's Journalism Award and the CLEA Human Rights Award, were selected because of the significant contributions that they have made on a long term basis toward advancing human rights in the Manitoba justice system. The award winners shared the \$1000 prize and each received a gift of a craft, created by a Manitoba craftswoman.

Kathy Mallet is the director of Aboriginal Ganootomage Justice Services. "Ganootamaage" is an Aboriginal word meaning "speaking for". The program presents an alternative justice approach for Aboriginal people in which both the victim and the offender are referred to as "broken-spirited relations", and the program incorporates restorative justice principles based upon Aboriginal culture and spirituality. Kathy worked on a volunteer basis for a number of years toward the establishment of the program. She has subsequently demonstrated her leadership and vision as its Director. When nominating Kathy to receive the award, Inspector Stan Tataryn of the Winnipeg Police Service noted that "Kathy gave up three years of her life, without remuneration, to develop a program that she thought would correct an inequality in our society."

Sherri Walsh acted on a pro bono basis as counsel for the Manitoba League of Persons with Disabilities and achieved status in court for that group to intervene as an interested party in the *Sawatzky v Riverview Hospital* court case. The case placed the issue of decision-making and Do Not Resuscitate Orders

into the context of human rights and Charter issues. The decision clarified the law and will have an impact not only on people with disabilities, but also on many patients and their families who may be facing end-of-life issues. Sherri later assisted in a research project conducted by the Manitoba League in conjunction

with the Canadian Council of Canadians with Disabilities, by preparing an analysis of the law in Canada concerning DNR Orders and patient(s) rights. Sherri was called to the Bar in Manitoba in 1986 and practices with the law firm Hill Abra and Dewar.

Friendly faces at the CLEA conference



Donna Seale, MHRC co-counsel speaks on human rights laws and the legal process.



Ken Filkow Q.C., MHRC Board of Commissioners Chairperson, speaks on the importance of Human Rights in our society.



Nellie McLung Theatre Group performed a number of thought-provoking vignettes.



Keynote speaker Mr. Alwyn Child, of the Office of the Federal Privacy Commissioner



Janet Baldwin, Estelle Munda and Sherri Musa enjoy the CLEA conference.



A workshop dealing with the New Approach to Accommodation.



New approach to accommodation

by Donna Seale Counsel to the Manitoba Human Rights Commission

When complaints of discrimination are filed with the Manitoba Human Rights Commission they are assessed in relation to the *Human Rights Code*, Commission policy and case law from our courts which establish or clarify legal principles that may bear on the facts and issues raised in the complaint.

Two recent decisions from the Supreme Court of Canada have significant implications for the investigation of complaints by the Commission. These cases will also be of particular interest to employers and service providers as they will have profound impact on the way certain defences to human rights complaints will be applied in the future. These decisions are known, respectively, as "*Meiorin*" and "*Grismer*".

The *Meiorin* case is important because it sets out the new unified test for analysing a defence of *bona fide* occupational requirement. It clarifies what had previously been a confusing area of the law. Ms. *Meiorin* was a member of a forest fire fighting crew for three years. Her employer had found her work to be satisfactory. Then, in her fourth year, the B.C. government adopted a series of minimum physical fitness tests.

Ms. *Meiorin* passed all of these tests except the one dealing with aerobic capacity and so she was fired. Ms. *Meiorin* complained that the fitness test was discriminatory against women, and not a legitimate occupational requirement. The Supreme Court of Canada held that the government had failed to establish that the aerobic standard it had adopted was one that was necessary

for the safe and efficient performance of the fire fighting job.

In coming to this conclusion, the court spelled out that for an employer to justify that a particular standard was a *bona fide* occupational requirement, the employer had to establish the following on a balance of probabilities:

1. the standard was adopted for a purpose that was rationally connected to the performance of the job;
2. the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of legitimate work-related purpose;
3. the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant, without imposing undue hardship upon the employer.

By virtue of this new test, the Supreme Court has indicated that it expects employers to have carefully thought through the rules and standards they adopt, in advance, and not simply to face the consequences of the adoption of the rule or standard on an ad hoc basis when an employee identifies a problem with that rule or standard.

Not only is *Meiorin* important because it has made clear the method of analysis to be adopted when a rule or standard is adopted by an employer, but it has also created a new basis upon which an employer can be found liable. On the issue of accommodation, the court took the position that both the procedures, if any, which were adopted to assess the issue of accommodation and the substantive content of either a more accommodating standard which was offered or, alternatively, the reasons for not offering accommodation are to be explored. While liability of an employer was previously limited to whether or not a complainant could be accommodated, now liability can also be found where the employer has not established a process to deal with accommodation issues.

Grismer followed on the heels of *Meiorin* and clarified certain elements of the *Meiorin* test; namely, the application of the test to discrimination in services and the extent of the requirement to consider accommodations. Mr. *Grismer* had a condition known as "HH" which eliminated his left-side peripheral vision in both eyes. The B.C. Superintendent of Motor Vehicles cancelled his driver's licence on the ground that his vision no longer met the standard of a minimum field of vision of 120 degrees. Mr. *Grismer* re-applied for his licence several times thereafter, passing all tests except the field of vision test. The Superintendent did not allow Mr. *Grismer* the opportunity to show he was able to compensate for his limited field of vision. Mr. *Grismer* filed a complaint of discrimination on the basis of disability.

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Meiron v. Grismer cont'd

Applying the *Meiorin* test, the Supreme Court concluded that the Superintendent's goal of reasonable (as opposed to absolute) highway safety was legitimate and rationally connected to the general function of issuing driver's licences, and was adopted in good faith. However, the court found that the "no HH" standard was not necessary to meet the goal of reasonable highway safety. The Superintendent was unable to demonstrate that no person with HH could drive safely, and failed

to show that individual assessment was impossible without incurring undue hardship. (There was evidence, for instance, that not every jurisdiction applied an automatic disqualification for this particular condition). The court held that under the *Meiorin* test it was incumbent on the Superintendent to show that he had considered and reasonably rejected all viable forms of accommodation. As to the Superintendent alleging that a prohibitive cost would be associated with individual assessments,

the court rejected such a contention because it was not backed up with precise figures. Impressionistic evidence of increased expense was found to be insufficient to meet the standard of proof. The *Meiorin* and *Grismer* cases have radically reshaped human rights principles and will have an impact on everyone interested in human rights, including employers and employees, service providers and their clientele and the Commission itself.

Settlement News

Sexual harassment

A female employee alleged that she was subjected to verbally offensive language by her female supervisor. Although she had asked the supervisor to stop, the harassment continued. The employer indicated that it had dealt with the situation as soon as it was made aware of it but in the circumstances, the employer agreed to participate in a mediation of the issue. A face to face mediation took place at the end of which the parties agreed that the employee would receive a letter of apology, a letter of reference, and the sum of \$3,000 as general damages. General damages represent a sum to compensate for injury to a person's dignity, feelings or self-respect.

Accommodation of a disability

An employee incurred a neck injury at work that created certain restrictions for the employee's continued employment. As the employer was allegedly not willing to accommodate the employee's restrictions, the employee quit. The employer did not provide an official position as it agreed to participate in a mediation of the matter. With the assistance of the Commission's

mediators, the parties negotiated a resolution of the employee's concerns whereby the employee received the sum of \$8,366.40 for lost wages, a revised record of employment and a letter of reference.

Accommodation for an illness

An employee was on disability leave in relation to a certain physical illnesses. The employee recovered from the illnesses and asked to return to employment with the employer. The employee alleged that the employer failed to find a suitable alternative employment that would accommodate the employee's restrictions. The employer denied that it failed to find suitable alternative employment and said that there was nothing available that would suit the employee's restrictions. The employer indicated that it did not think that it had to involve the employee in the planning process of finding suitable employment. The parties agreed to settle the matter whereby the employee received the sum of \$17,500 and a letter of reference.

Discrimination on the basis of ancestry

A person alleged that she had been denied her request to use the public telephones in a hotel on the basis of her aboriginal ancestry. The hotel denied that this person had been treated differently and said that the public telephones in the lobby of the hotel were for the hotel's guests only. The parties agreed to a face to face mediation of the matter at the end of which the hotel agreed to ensure that its policies and procedures would be applied in a consistent, timely and non-discriminatory manner. A letter of apology and the sum of \$500 as general damages was also provided to the person who made the complaint.

Sexual harassment

An employee alleged that, shortly after she began working, she was sexually harassed by the owner of a business providing medical services. The employee quit soon after the incident. The owner of the business did not respond to the allegations but agreed to mediate the matter.

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A negotiation facilitated by the Commission's staff resulted in the owner agreeing to pay the sum of \$8,256 to the employee for lost wages.

Sexual harassment

An employee alleged that the president of a company had subjected the employee to unwanted solicitations and advances including suggestive remarks and proposals, both in the workplace and in telephone calls to the employee's home. The employee also alleged that the president physically touched the employee in a sexual manner. The allegations were investigated and the Board of Commissioners did not dismiss the complaint and caused mediation to be undertaken between the employee and the president. The president proposed a settlement of the matter that was accepted by the employee which settlement included the payment of \$2000 in general damages to the employee.

Accommodation of a disability

A deaf employee alleged that his employer's refusal to permit the deaf employee to operate a forklift was differential treatment on the basis of a disability. The employer acknowledged that it refused to permit the deaf employee to operate

a forklift but said that it did so for safety reasons. The matter was investigated and it appeared that the employer could take certain measures and precautions that would satisfy the safety concerns that the employer had.

In addition, it appeared that other businesses, where forklifts were operated, permitted persons with hearing disabilities to operate forklifts with certain restrictions. In view of the evidence as a whole, the Board of Commissioners did not dismiss the complaint and recommended that settlement negotiations to be undertaken between the employee and the employer. The employee was not looking for any monetary compensation, but the opportunity to operate a forklift that would translate into more work and possibly higher wages. The employer reviewed the information gathered by the Commission's counsel and agreed to amend its policies to permit the employee and other employees with hearing disabilities to operate forklifts with certain restrictions that would satisfy any safety concerns.

Accommodation of a disability

A resident of an apartment complex where access to both entrances involves the negotiation of steps alleged that his health was

deteriorating and he would be forced to use a wheelchair in the near future. The resident was presently using a walking device. The resident alleged that the owner of the apartment complex refused to consider the resident's requests for accommodation by building a ramp at one of the entrances. The matter was investigated and it was recommended that the Board of Commissioners not dismiss the complaint. The Board of Commissioners agreed that there appeared to have been a failure to accommodate and did not dismiss the complaint but caused mediation to be undertaken between the resident and the owner. The owner refused to mediate the resident's concerns and consequently the Board of Commissioners referred the matter to a Board of Adjudication. The owner agreed to resolve the matter by way of a consent order whereby the owner agreed to build a ramp to accommodate the resident's needs by a specific date. The Commission continued to monitor the situation until it was determined that a ramp had been constructed.

Human Rights Day in Brandon

by Pat Daniels Regional Human Rights Officer

The staff of the Brandon Regional Office of the Manitoba Human Rights Commission hosted an open house in recognition of International Human Rights Day on Friday, December 8. Approximately 40 people attended the open house.

City Councillor Marion Robinsong,

a former Commissioner for the Human Rights Commission, conducted a candle lighting ceremony during the open house. She gave a very interesting and informative overview of the Canadian Bill of Rights, Canadian Charter of Rights and Freedoms, and the Universal

Declaration of Human Rights. Following the lighting of the candle, Councillor Robinsong passed the candle around for all those present to be able to hold and to reflect on the need for human rights.



Education Programs 2001

Employment Seminar

A full day, business-oriented seminar specifically for employers, to answer questions on topics including employers' rights, pregnancy, dress codes, sexual harassment, and accommodating religion and disabilities. Print materials will be provided. Atmosphere will be confidential and informal. Registration is limited to 40 participants (additional seminars will be planned if they are required) Seminars are also available in rural areas by special arrangement.

Location: Norwood Hotel, 12 Marion Street, Winnipeg Manitoba (free parking provided)

Cost: \$25 (lunch and two coffee breaks are included)

Dates: Feb. 21, April 18, May 23, Sept 26, Nov. 14 **Time:** 8:30 AM – 4:00 PM

Reasonable Accommodation in the Workplace

A three-and-a-half hour seminar that considers when employers have a duty to take reasonable steps to accommodate employees- in what circumstances does this duty arise, and what rights and obligations does an employer have when it does? This seminar offers practical advice to employers to help them deal with a difficult area of human rights legislation, and provides an opportunity to raise specific questions. This seminar will be of interest to those who wish to develop a more in-depth understanding of this issue than is offered in our *Employment Seminar*. Registration is limited to 20 participants.

Location: MHRC offices: 7th floor - 175 Hargrave St., Winnipeg Manitoba

Cost: \$15 (lunch and a coffee break included)

Dates: May 31, Oct. 25 **Time:** 9 AM – 12:30 PM

Harassment in the Workplace

It's good business for employers to develop and implement anti-harassment policies. Canadian courts and tribunals require employers to provide employees with a harassment free workplace and may assess significant financial penalties if they do not. This three-and-a-half hour seminar focuses on what conduct constitutes harassment under the Human Rights Code, and how employers can minimize their liability and develop a harassment-free workplace. Sample policies will be provided. This seminar will be of interest to employers who want a more in-depth discussion of harassment than that covered in the general *Employment Seminar*. Registration is limited to 20 participants.

Location: MHRC offices: 7th floor - 175 Hargrave St., Winnipeg Manitoba

Cost: \$15 (lunch and a coffee break included)

Dates: June 14, Oct. 11 **Time:** 9 AM - 12:30PM

Recent Developments in Human Rights Laws

A course comprised of 2 one-and-a-half hour lunchtime seminars that will consider the effect of recent court and tribunal decisions dealing with equality and human rights laws and identify emerging issues. This series will be of interest to lawyers, law students human resource professionals and anyone who wishes to develop a better understanding of human rights legislation and its impact. Registration is limited to 20 participants. The course will be delivered by Aaron Berg, legal counsel for the Manitoba Human Rights Commission.

Location: MHRC offices: 7th floor - 175 Hargrave St., Winnipeg Manitoba

Cost: \$15 (two lunches included)

Dates: Nov. 8, Nov. 15 **Time:** 12 PM - 1:30PM



Human Rights Issues for Non-Profit Organizations

A seminar that is similar to our *Employment Seminar* but includes topics designed specifically to assist non-profit organizations. Topics include: what questions can be asked when screening volunteers, developing anti-harassment policies, responding to a human rights complaint, and reasonable accommodation issues. Registration is limited to 20 participants.

Location: MHRC offices: 7th floor - 175 Hargrave St., Winnipeg Manitoba

Cost: \$15 (lunch and a coffee break included)

Dates: Apr. 5, Sept. 20 **Time:** 9 AM - 12:30 PM

Human Rights Issues for Rental Agencies, Property Owners and Apartment Managers

A seminar that is similar to our *Employment Seminar* but includes topics designed specifically to assist individuals or organizations responsible for renting accommodations. Topics include: the rights of owners/agents, the rights of tenants, reasonable accommodation issues, what questions can be asked when screening potential tenants, and responding to a human rights complaint. Registration is limited to 20 participants.

Location: MHRC offices: 7th floor - 175 Hargrave St., Winnipeg Manitoba

Cost: \$15 (lunch and a coffee break included)

Date: June 7 **Time:** 9 AM - 12:30 PM

For Registration Information Contact the Manitoba Human Rights Commission:

In Winnipeg: (204) 945-3007 **Toll Free:** 1-888-884-8681 **Fax:** (204) 945-1292

New commission staff



Intake Officer Lorraine Lambert

Lorraine joined the Commission mid August 2000 as a bilingual Intake Officer. One of her primary responsibilities will be working as a liaison in the Francophone Community in the new bilingual government services offices to be situated

at the Club La Vérendrye on Des Meurons Avenue in St. Boniface. She has been with the government since 1982 and comes with varied experience having worked for Natural Resources. She has also worked as a Coordinator of Student Services for Student Financial Assistance Program acting as a liaison attending to students individual situations with educational institutions, services agencies and banking institutions. In the past, Lorraine has been involved in Workplace, Safety & Health, Fire and Building Committees and the All Charities Campaign Planning

Committee as Assistant Campaign Manager, and looks forward joining some of these committees in our office. She also continues to be a Board member and Swim Program Convenor for the Norwood Community Club. With her experience, Lorraine is looking forward to learning more through work and courses to help educate the workforce and other individuals providing a service to the community of their rights and responsibilities under the Manitoba Human Rights Code.